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Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER, APPELLANT,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, A MUNICIPAL CORPORATION, HAL EVERETT, CITY MANAGER OF SAID CITY, JOHN OLSON, MAYOR AND MEMBER OF THE CITY COMMISSION OF SAID CITY, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 39782

LEE WALKER, Appellant,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation; T. E. Chenoweth, City Manager of Said City; Robert G. King, Mayor and Member of the City Commission of Said City; Charles N. Brown, Jerry Stremel, R. C. Woodard, and C. E. Johnson, Members of the City Commission of Said City, Appellees

Appeal from the District Court of Reno County, Kansas
Hon. John Fontron, Judge.

Abstract of Appellant

STATEMENT

This is an action by a property owner to permanently enjoin and restrain the City of Hutchinson from entering or trespassing on Plaintiff's property.

The action raises the constitutionality of G.S. 26-202 which pretends to vest in a city the right to condemn real estate without notice to the property owner.

The Trial Court held the statute constitutional. This appeal is taken therefrom.

[fol. 2] IN DISTRICT COURT OF RENO COUNTY, KANSAS

AMENDED PETITION

Comes now Lee Walker, the plaintiff herein, by his attorneys, Oswald & Mitchell, and for his cause of action against the City of Hutchinson, Reno County, Kansas, T. E. Chenoweth, City Manager, Robert G. King, Mayor and Members of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City

Commission, all of the City of Hutchinson, Reno County, Kansas, respectfully states to the Court:

2. That the Plaintiff is a resident of Hutchinson, Reno County, Kansas, and that his post office address is 907 East 11th Street, Hutchinson, Kansas; that he is a Negro; that he was born in Bargtown, Kentucky on the 15th day of October, 1875, and that he had, as a youth, an education equivalent to the Sixth Grade.

3. That Defendant City of Hutchinson, Reno County, Kansas is a municipal corporation; that the above named individual Defendants are respectively T. E. Chenoweth, City Manager, Robert G. King, Mayor and a member of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodard and C. E. Johnson, members of the City Commission, all of the City of Hutchinson.

4. That on or about the 27th day of February, 1905, the Plaintiff acquired fee simple title through a Warranty Deed, duly executed by one Arthur Walker, which deed was duly recorded with the Register of Deeds of Reno County, Kansas, on the 28th day of February, 1905, in Book 85, Page 479, to the following described real estate, all situated in Reno County, Kansas:

> Lots thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47) and forty-eight (48), Block Five (5), Maple Grove Addition to the City of Hutchinson,

[fol. 3] and ever since that time, the Plaintiff has owned same, enjoyed quiet and peaceful possession thereof and likewise has had and enjoyed all the fruits of such ownership, and has paid, from time to time, all assessments and taxes of every kind and nature legally assessed against said real estate; that he is therefore now the legal and equitable owner of said real estate.

5. That on or about the 12th day of April, 1954, the defendant City of Hutchinson, through its duly elected or appointed, qualified and acting officials, filed an action in the District Court of Reno County, Kansas, entitled:

> In the matter of the application of the city of Hutchinson, Kansas, a municipal corporation, for the ap-

pointment of commissioners in the matter of the condemnation of property for the acquisition of right of way for the opening, widening and extending of portions of Eleventh Avenue, Harrison Street and Twenty-third Avenue in the city of Hutchinson, Kansas,

the same being docketed as Case No. 7867.

6. That said action was for the purpose of taking from the Plaintiff and condemning certain portions of the above described real estate, as a by-pass, so to speak, for Hutchinson's Super-Sports Arena.

7. That the Plaintiff has never been, at any time, notified in any manner that the City of Hutchinson coveted the bit of real estate as a by-pass to Hutchinson's Super-Sports Arena he has owned since 1905; nor has he ever been served with any summons, nor given any other personal notice of any kind whatsoever that said defendant City of Hutchinson had filed the aforesaid action for the purpose of taking a part of his said real estate.

[fol. 4] 8. That the pretended right of defendant City of Hutchinson to the real estate above legally described, owned by the Plaintiff, rests upon the authority, so far as this Plaintiff and counsel have been able to ascertain, of G.S. 26-201 and 26-202, and Reno County, Kansas District Court Case No. 7867, more fully described in Paragraph 5 herein, brought thereunder, which statute or statutes are void and of no force and effect whatsoever, because same attempt to vest the power in certain municipalities to take property without due process of law.

9. That the only notice to an owner of real property, which G.S. 26-201 and 26-202 requires is by publication, which is not sufficient notice under the above mentioned due process clauses of both Federal and State Constitutions.

10. That the Plaintiff had no actual notice, and did not actually know, or have any reason to know that Defendants sought to condemn and take his land, until approximately the middle part of August, 1954; unless by a peculiar quirk of the imagination, it can be said that the single legal publication, published just once in The Hutchinson News-Herald, and that on the 14th day of April, 1954, gave him notice; that said single notice so published in the official newspaper

was not sufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

11. That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.

12. That the Plaintiff is entitled to an Order of this Court instanter, enjoining and restraining defendant City of Hutchinson from entering upon, or in any manner trespassing upon said real estate, for the reason, inter alia, that [fol. 5] there is no other remedy, either at law or in equity, open to the Plaintiff; that if said defendant City of Hutchinson is not so restrained and enjoined, the Plaintiff will suffer irreparable damage by reason thereof.

13. That the Plaintiff is advised that in some orders by Courts of competent jurisdiction, in the granting of a restraining order, or temporary injunction of this nature, the party seeking same, and obtaining same, is required to post certain indemnity or other type of bond or bonds; that the Plaintiff hereby respectfully and humbly advises the Court that by reason of his limited financial resources, he cannot post such a bond, and therefore asks, upon the above and foregoing statement of facts, that the Court does not make the giving of such a bond or bonds as a condition precedent to Plaintiff's obtaining a restraining order or temporary injunction at this time.

14. That by reason of the above and foregoing facts, the Plaintiff is entitled to have, and desires to have a permanent injunction against defendant City of Hutchinson, restraining and enjoining it, and its servants, agents and all others in its employment, from entering or trespassing upon the Plaintiff's real estate, above described, or preventing him from otherwise enjoying the quiet and peaceful enjoyment thereof.

Wherefore and by reason of the foregoing, the Plaintiff prays for an immediate Order of this Court restraining and enjoining defendant City of Hutchinson from entering or trespassing upon the Plaintiff's real estate, above described,

and the Plaintiff further prays for a judgment of this Court permanently enjoining and restraining the City of Hutchinson from entering or trespassing upon Plaintiff's real estate, above described; and Plaintiff further prays for judgment for his costs herein, and for such other and further [fol. 6] relief as to this Court seem just and equitable.

/S./ A. Lewis Oswald, for Oswald & Mitchell, Attorneys for the Plaintiff.

Duly sworn to by Lee Walker, jurat omitted in printing.

In District Court of Reno County

Answer

Come now the defendants, and for answer to the petition of plaintiff filed herein, deny each and every, all and singular, the allegations of plaintiff's petition, except those hereinafter explained, admitted or modified.

Defendants admit the allegations contained in paragraphs numbered 2, 3, and 5 of plaintiff's petition, and defendants further admit that the right of eminent domain exercised by the defendant City of Hutchinson, Kansas, is based upon the provisions of G.S. 1949, 26-201 and 26-202, as well as upon other statutes; that Reno County District Court Case No. 7867 was for the purpose, among other things, of condemning a portion of plaintiff's property for a public street in [fol. 7] the City of Hutchinson, Kansas; that said statute G.S. 1949, 26-202, provides for notice by publication in the official city paper in condemnation proceedings such as the one here involved and that such a notice was published on April 14, 1954, in the Hutchinson News-Herald, the official city paper, which fully described the portion of plaintiff's property being condemned for street purposes, such description being that set forth in paragraph 16 of plaintiff's petition.

For further answer to plaintiff's petition, defendants allege and state:

1. That said publication of notice in the Hutchinson News-Herald on April 14, 1954, specifically named the

plaintiff therein and described the portion of his property being condemned, and was published more than ten days prior to April 27, 1954, the date set forth in said notice for the meeting of the commissioners for the assessment of damages, all as provided by G. S. 1949, 26-202. A copy of said notice is hereto attached, marked Exhibit "A", and made a part hereof as of fully set forth herein.

2. That the said notice by publication, as provided by G. S. 1949, 26-202, is sufficient notice under the due process of law clause of both the United States and Kansas Constitutions, and that G. S. 1949, 26-201 and 26-202, are valid and constitutional statutes, and that the procedure followed by the defendant City of Hutchinson, Kansas thereunder in condemning the aforesaid portion of plaintiff's property for a public street in said City is authorized by said statutes and is therefore valid and legal.

Wherefore, defendants demand judgment that plaintiff take naught by his suit, and for the costs herein.

(S.) Fred Littooy, City Attorney, Attorney for Defendants.

[fol. 8] EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

No. 7867

In the Matter of the Application of the CITY OF HUTCHINSON, KANSAS, a Municipal Corporation for the Appointment of Commissioners in the Matter of the Condemnation of Property for the Acquisition of Right of Way for the Opening, Widening and Extending of Portions of Eleventh Avenue, Harrison Street and Twenty-Third Avenue in the City of Hutchinson, Kansas

Notice of Condemnation

To Patrick J. O'Farrell, Agatha O'Farrell, Jennie Mueller, Kenneth D. Gitchell, Myrtle Gitchell, J. O. Gitchell, Nellie B. Gitchell, Everett S. Cole, Nina M. Cole, Nellie Gitchell, Pearl D. Graham, The Railroad Building, Loan and Savings Association, H. K. Gordon, Virginia Dean Gordon, V. W. Cochran, Anita Cochran, Roy Freeman, J. W. Wood, Opal O. Wood, Fred W. Gilbert, Fern Gilbert, First Federal Savings and Loan Association of Hutchinson, Oblate and Company, Lee Walker, Gladys G. Whitford, Claude M. Reed, Anna Edna Reed, M. M. Hays, Ruth J. Hayes, Herbert K. Harrison, Theresa R. Harrison, W. C. Wilde, and All Other Persons Concerned:

Public notice is hereby given as required by law that an Application has been made to the Judge of the District Court of Reno County, Kansas, by the City of Hutchinson, [fol. 9] Kansas, a municipal corporation and a city of the first class of Reno County, Kansas, requesting said Judge of the said District Court of Reno County, Kansas, to appoint three commissioners to make an appraisement of the value of the land taken and an assessment of the damages caused to the owners thereof by the condemnation of the following-described real property under and by virtue of the statutory authority of Article 2, Chapter 26, General Statutes of Kansas, 1949, and amendments thereto, to wit:

Tract 1. Commencing at the Northwest corner of Lot 48, Block 5, Maple Grove Addition to Hutchinson, Kansas, for

place of beginning, thence south 80 feet, thence northeast to the northeast corner of Lot 41, Block 5, Maple Grove Addition, thence west to place of beginning.

Tract 2. Commencing 845 feet east of the southwest corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 50 feet, thence south 30 feet, thence west 50 feet to place of beginning.

Tract 3. Commencing 895 feet east of the southwest corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 50 feet, thence south 30 feet, thence west 50 feet to place of beginning.

Tract 4. Commencing 945 feet east of the southwest corner of the Northeast Quarter (NE/4) of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 100 feet, [fol. 10] thence south 30 feet, thence west 100 feet to place of beginning.

Tract 5. Commencing 30 feet west of the southeast corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M., Reno County, Kansas, for place of beginning, thence west 231 feet, thence south 30 feet, thence east 231 feet, thence north 30 feet to place of beginning.

Tract 6. West 25 feet of the north 116 feet of a tract commencing at the northeast corner of Lot 1, Block 18, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence west 111 feet, thence south 185 feet, thence east 111 feet to place of beginning.

Tract 7. West 25 feet of the south 69 feet of a tract commencing at the northeast corner of Lot 1, Block 18, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence west 111 feet, thence south 185 feet, thence east 111 feet to place of beginning.

Tract 8. East 19.5 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

Tract 9. North 92½ feet of the west 5.5 feet of the east

25 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

[fol. 11] Tract 10. South 92½ feet of the west 5.5 feet of the east 25 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

Tract 11. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West for place of beginning, thence west on the south line of said Northeast Quarter 276 feet, thence north 13.65 feet, thence east to a point on the east line of said Northeast Quarter that is 20 feet north of place of beginning, thence south 20 feet to place of beginning, except the east 33 feet of said tract.

Tract 12. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on the south line of said Northeast Quarter 276 feet for place of beginning, thence continuing west 85 feet, thence north 11.8 feet, thence east to a point that is 13.65 feet north of the south line of the said Northeast Quarter and 276 feet west of the east line of the said Northeast Quarter, thence south 13.65 feet to place of beginning.

Tract 13. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on the south line of the said Northeast Quarter 361 feet to place of beginning, thence continuing west 191 feet, thence north 7.25 feet, thence east to a point that is 11.8 feet north of the south line of the said Northeast [fol. 12] Quarter and 361 feet west of the east line of the said Northeast Quarter, thence south 11.8 feet to place of beginning.

Tract 14. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on south line of said Northeast Quarter 552 feet for place of beginning, thence continuing west

to a point that is 646.11 feet east of the southwest corner of the Southeast Quarter of the said Northeast Quarter, thence north 5.6 feet, thence east to a point that is 7.25 feet north of the south line of said Northeast Quarter and 552 feet west of the east line of the said Northeast Quarter, thence south 7.25 feet to place of beginning, all of the above-described real estate being situated in the City of Hutchinson, Reno County, Kansas, and all of said land to be used by the said City of Hutchinson, Kansas, for public streets, all as is provided by law.

The said Judge of the said District Court of Reno County, Kansas, did on the 12th day of April, 1954, duly appoint the undersigned as such commissioners, and we have duly qualified as required by law.

Now, therefore, public notice is hereby given as required by G. S. 1949, 26-202, and amendments thereto, that we, as said commissioners, will meet at the office of the City Engineer, located in the Convention Hall in the City of Hutchinson, Kansas, on the 27th day of April, 1954, at 9:30 A. M. of said day, then and there to commence and proceed with the duties imposed upon us as required by law.

[fol. 13] Dated at Hutchinson, Kansas, this 12th day of April, 1954.

O. L. Miller, Phil Sames, Mont Hilleary.

Published April 14, 1954, in the Hutchinson News-Herald.

IN DISTRICT COURT OF RENO COUNTY

REPLY

Comes Now, Lee Walker, the plaintiff in the above captioned suit, by Oswald & Mitchell, his attorneys, and for reply to the Answer filed herein admits the material facts pleaded therein, but denies, of course, the legal conclusions set forth therein, namely that G. S. 26-201 and 26-202 do not violate the due process clauses of the Federal and State Constitutions, which the Plaintiff challenges in this cause of action.

(S.) A. Lewis Oswald, for Oswald & Mitchell, Attorneys for the Plaintiff.

In District Court of Reno County

Memorandum Opinion

Plaintiff's application for a temporary injunction was heard on October 4th. At the conclusion of the hearing, counsel requested that, to eliminate the need of further trial, the case be placed at issue immediately and that decision then be rendered on plaintiff's prayer for a permanent injunction, based on the pleadings, and considering the proceedings of October 4th as having been had on a hearing for permanent injunction. By agreement of counsel, defendants' motion to strike was thereupon sustained, after which plaintiff filed his amended petition. The defendants have filed their answer, and the plaintiff, his reply. The case is now at issue and decision will be as to the issuance of a permanent injunction.

[fol. 14] At the outset it must be borne in mind that the inquiry in this matter must be directed to the constitutionality of Section 26-202 as it pertains to the facts of this case and whether plaintiff has been deprived of his property without due process of law by reason of the notice given thereunder, rather than to the wisdom of the legislature in passing the statute or the expediency of action by the City pursuant thereto. Whether the statute was wisely enacted and whether sound public policy should dictate the giving of different or additional notice are matters that must be addressed to the legislative rather than to the judicial branch of government, always provided of course that the statute does not contravene constitutional provisions.

The statute involved in this action provides, so far as herein pertinent, that the condemnation commissioners shall give owners and lien holders of the property condemned at least 10 days notice in writing of the time and place when and where the damage will be assessed, *or* by one publication in the official city paper. This statute first appeared as Section 2, of Chapter 86, Laws of 1913, in which it was provided that the commissioners give at least 10 days' notice in writing by one publication in the official city paper. The 1913 law was revised in 1923 and appeared in its present form in the Revised Statutes of 1923. It has undergone no material change since then.

It is plaintiff's contention that the notice provided for by said statute is unconstitutional, particularly as it pertains to resident land owners, because it provides for notice by publication rather than by personal service. However, the general rule appears to be that personal service of a notice of this kind is not required by those constitutional provisions that prohibit the taking of property without due process of law. In Section 1534, McQuillan on Municipal Corporations, the rule is thus stated:

> [fol. 15] "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

The same rule is set out in 20 CJ 938, wherein it is said:

> "'Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication.'"

In the case of State of Georgia v. City of Chattanooga, 264 U. S. 472; 44 Sup. Ct. 369; 68 Law Ed. 796, the United States Supreme Court, speaking on page 800, says:

> "Personal service upon the owner is not essential; publication of notice is sufficient."

This rule was approved and followed in the cases of Newman, et al. v. Lynchburg Investment Corporation, 236 U. S. 692; 35 Sup. Ct. 477, 59 Law Ed. 792, and Ballard v. Hunter, 204 U. S. 254; 51 Law Ed. 461. And in the case of North Laramie Land Company v. Hoffman, 268 U. S. 283; 69 Law Ed. 953, the court says:

> "All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are

general in their application,—facts of which the landowner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that [fol. 16] they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

One of the latest expressions of the United States Supreme Court is found in the case of Anderson National Bank v. Luckett, 321 U. S. 233; 64 Law Ed. 599, in which the court upheld notice given to bank depositors by posting a report on the courthouse door or bulletin board as being sufficient to satisfy the requirements of due process of law. In discussing the question, the court says, on page 605:

"All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Cases from several states are found in support of this rule of law, and reference is here made to a few of them. In the case of Henritzy v. Harrison County (Miss.), 178 So. 322, the county had condemned land without any notice and thereafter published notice advising land owners to file their [fol. 17] claims for compensation within 30 days. This

procedure was held valid, and the court, in its discussion, said:

> "In the case of Stewart v. Hinds County, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding in rem and not in personam." . . . "We believe the present case is strictly a proceeding in rem, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

The case of Nishnabotna v. Drainage District (Mo.), 55 SW 276, was one in which the court upheld a statute that authorized the institution of condemnation proceedings by the publication of notice against owners regardless of their residence. On page 277, the court says:

> "That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

The statute involved in the case required a 15 days' notice and notice was actually given for 19 days, in three publications. In the case of Ryan v. Housing Authority of the City of Newark, 15 Atl. 2647, the Supreme Court of the State of New Jersey held that notice of the proceedings may be indirect. See also, Great Northern R. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Taylor v. Emmet Co. Drainage Dist., 167 Iowa 42, 148 N. W. 1040; Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353.

The case of Winnebago Furniture Manufacturing Company v. Wisconsin Railway Company, 51 N. W. 576, ap- [fol. 18] pears to be quite in point. In that case the Wisconsin statute provided for alternative methods of giving notice, either by publication or by personal service, and the court, in upholding the statute, says:

> "The statute provides that notice 'may be served personally or at the last and usual abode of such

owners and parties interested not less than five days before such hearing, or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the date set for hearing such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as non-resident owners in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending'."

It is to be noted that the statute involved in this case is very similar to the one under consideration since the alternative methods of giving notice are the same and the length of time required is identical.

Admittedly, there are authorities which hold to the contrary. The Supreme Court of Michigan in the case of Knudinger v. City of Saginaw, 26 N. W. 364, declared invalid a city ordinance which made no provision for personal service of a notice upon resident owners in cases where such service was feasible. Likewise, the Supreme Court of the State of Washington, in the case of Smith, et [fol. 19] al v. Cochrane, (Wash.), 37 P. 311, held that personal notice was necessary in case of resident landowners and that the requirements of due process were not fulfilled when publication service only was had upon them. However, in this latter case the court recognizes that its holding is against the weight of authority and says, on page 312:

"Returning to the question of notice, there is no doubt that the prevailing number of cases, and perhaps the weight of authority, the country over, is that in condemnation cases the legislature has the power to

prescribe the kind of notice, whether personal or constructive, which shall be given to property owners, resident or nonresident. Lewis, Em. Dom. Sec. 367; Brown, Jr., Sec. 172; Elliott, Roads & S., pp. 152, 153."

Two Wisconsin cases are also cited in support of the doctrine enunciated in the last two cases but both cases were decided prior to the case of Winnebago Furniture Company v. Wisconsin Railway Company, supra, and both were overruled by the later case.

Although the Supreme Court of Kansas has never passed upon the constitutionality of Section 26-202, or the validity of the provision for notice, nevertheless it has had occasion to discuss and pass upon similar questions relating to notice in connection with other condemnation statutes. The early case of Hunt v. Smith, 9 Kan. 137, was an action to enjoin certain individuals from appropriating land for a railroad right of way and to recover damages for trespass upon such land. The defense interposed was that the land had been condemned, but plaintiff contended that the condemnation proceedings were invalid because of defective notice. Section 49 of the pertinent law then in effect required that personal notice be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publica- [fol. 20] tion generally. The plaintiff alleged he was a resident of the state, was in actual possession of the land, looking after and caring for the same, but did not actually reside thereon, although having keys to the house and stables. The court held that plaintiff was not an actual occupant of the land, although he was the owner, and that the service upon him by publication was valid. The court says on Page 145:

"An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon; and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by Amended Section 86 of such act, is sufficient."

The case of Missouri River F. S. & G. R. Company v. Shepard, 9 Kan. 647, was brought against the railroad company to recover damages for trespass and involves the same Section 86 referred to in the Hunt case. The railroad company had condemned certain land but the plaintiff, who was the owner and in possession of the land concerned, claimed that the proceedings were invalid for the reason that no map and profile had been filed before notice was given and that therefore there was no actual notice. The court first discussed the question of filing the map and profile and concluded that it need not be done before publishing notice. Then, turning to the question of notice, the court says on page 654:

"Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process [fol. 21] of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." . . . "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county,' etc. This does not contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc.; or in cases of changes in the valuation of real estate by the boards

of equalization; or in the matter of street improvements in cities, or opening roads in the country."

This language is peculiarly appropriate to the case at bar and has never been criticized by the Supreme Court in any subsequent decision. It appears just as valid today as it was when uttered many years ago.

The provisions concerning notice by publication contained in this same Section 86 were upheld by the Supreme Court of the United States in the case of Huling v. Kaw Valley Railway and Improvement Company, 130 U. S. 559, 32 Law Ed. 1045. Although in this case the land owner was a non-resident of the state, and the precise question involved was the validity of the service as it pertained to such an owner, [fol. 22] no distinction seems to have been made, in much of the language used, between residents and non-residents. On page 563 the court, in discussing the propriety of publication notice, states:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

A more recent Kansas case, which is illuminating, is that of Harrison v. Newman, et al, 71 Kan. 324, which upheld a notice by publication given in condemnation proceedings. The statute provided for the appointment of appraisers who should have at least three days' notice in the official paper of the time and place of their meeting for the assessment of damages and benefits. The court held that condemnation proceedings conducted under this statute and in pursuance of such notice was valid. In the syllabus the law of the case is set out as follows:

> "The notice required by section 160 of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a substitute for the notice required by section 161a of the same act to be given by the appraisers appointed

to assess damages in condemnation proceedings generally."

"A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

[fol. 23] In view of the Kansas cases cited above, none of which have been disapproved or overruled in any way, it appears to me that the question as to the validity of notice by publication cannot at this time be considered an open one in Kansas. The pronouncements of the Supreme Court concerning the notice required in condemnation matters appears definitely to be in accord with the generally accepted rule prevailing in this country.

But it is also contended the statute is invalid for the further reason that the length of notice required is but 10 days and that but one publication thereof is required. Parenthetically it may here be noted that the notice was actually published 13 days prior to the meeting of the condemnation commissioners. Perusal of cases involving the question of notice discloses a variety of statutory provisions as to requirements for length of time and number of publications, ranging from the three days and one publication involved in Harrison v. Newman, supra, to the thirty days' notice required by the statute construed in Hunt v. Smith, supra, and Missouri River F. S. & G. R. Company v. Shepard, supra. In the Wisconsin case before cited the length of time was 10 days and the number of publications, one. Statutes construed in other cases cited herein provide for notices of 10, 15, 20 and 30 days, with the number of publications varying in each instance with the length of the notice. From a consideration of all the cases examined I cannot conclude that the provisions for notice contained in Section 26-202 are so unreasonable as to violate the due process clause of the constitution.

In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its

requirements, plaintiff has not been deprived of his property without due process of law.

[fol. 24] In arriving at this conclusion the Court does not intend to express an opinion as to the wisdom of the statutory requirement, nor to indicate any personal approval of the form or type of notice given in these condemnation proceedings. Such matters are not within the judicial prerogative.

In accordance with the views expressed herein the plaintiff's prayer for a permanent injunction will be denied as of the 1st day of November, 1954.

John Fontron, District Judge.

IN DISTRICT COURT OF RENO COUNTY

JOURNAL ENTRY—October 4, 1954

Now on this 4th day of October, 1954, the same being a regular day of the September term of said court for said year, the above-entitled action comes on for hearing and trial; the plaintiff being present in person and by his attorneys, Oswald & Mitchell, and the defendants being present by their attorneys, Fred C. Littooy, City Attorney, and Bill R. Cole, Assistant City Attorney.

Thereupon, the hearing of plaintiff's application for a temporary injunction is proceeded with before the court without a jury, and plaintiff introduced his evidence in support of his petition for a temporary injunction and rested.

Thereupon, it was stipulated in open court by the attorneys for plaintiff and defendants that in order to eliminate the need for further trial and hearing, the case be placed at issue on plaintiff's petition for a permanent injunction immediately and that a decision be rendered on plaintiff's prayer for a permanent injunction, such decision to be based on the pleadings as finally formed, and on the evidence introduced on this date. It was further stipulated by the parties hereto that briefs be submitted on or before October 6, 1954.

[fol. 25] Thereupon, defendants filed a Motion to Strike, which motion was sustained by the court on October 7, 1954.

Thereupon, plaintiff filed an amended petition herein, defendants filed an Answer, and plaintiff filed his Reply.

Briefs were submitted by both plaintiff and defendants, and the court took the matter under advisement.

Thereupon, on this 1st day of November, 1954, the same being a regular day of the September term of said court of said year, the above-entitled matter being at issue and the pleadings formed, the court, having examined the briefs and pleadings filed herein, having heard the evidence introduced on October 4, 1954, and being fully advised in all of the premises, finds that the allegations contained in defendants' Answer are true; that Section 26-202 of the General Statutes of Kansas, 1949, is constitutional; that the defendant, City of Hutchinson, acted pursuant to such statute and complied with its requirements with respect to condemning a portion of plaintiff's property for a public street in said City, and that the plaintiff has not been deprived of his property without due process of law by reason of such statute and the defendant City of Hutchinson's condemnation proceedings conducted thereunder.

It is, therefore, by the court considered, ordered, adjudged and decreed that the restraining order heretofore issued herein against the defendants be and the same is hereby vacated and dissolved; that the plaintiff's prayer for a temporary injunction and for a permanent injunction be and the same is hereby denied, and that judgment be and the same is hereby rendered in favor of the defendants and against the plaintiff.

[fol. 26] It is further considered, ordered, adjudged and decreed that the plaintiff pay the costs of this action.

(S.) John Fontron, District Judge.

Approved: (S.) A. Lewis Oswald, for Oswald & Mitchell, Attorneys for Plaintiff. (S.) Fred Littooy, City Attorney, Attorney for Defendants.

In District Court of Reno County

Notice of Appeal to the Supreme Court of the State of Kansas—November 30, 1954

To defendants City of Hutchinson, Reno County, Kansas, a municipal corporation; T. E. Chenoweth, City Manager of said City; Robert G. King, Mayor and member of the City Commission of said City; Charles N. Brown, Jerry Stramel, R. C. Woodard and C. E. Johnson, members of the City Commission of said City; and Fred C. Littooy and Bill R. Cole, their attorneys of record:

You and each of you are hereby notified that the Plaintiff herein hereby appeals to the Supreme Court of the State of Kansas from a certain judgment rendered herein by the above named Court, namely, by the District Court of Reno County, Kansas:

Said judgment being evidenced by the Journal Entry filed herein on the 4th day of October, 1954, in which said Trial Court held that Section 26-202 of the General Statutes of Kansas, 1949, is constitutional; that defendant the City [fol. 27] of Hutchinson acted pursuant to such statute and complied with its requirement with respect to condemning a portion of Plaintiff's property for a public street in said City, and that the Plaintiff has not been deprived of his property without due process of law by reason of such statute, and the defendant City of Hutchinson's condemnation proceedings conducted thereunder; that the Plaintiff's prayer for a temporary injunction and for a permanent injunction be and the same is hereby denied; that judgment be and the same is hereby rendered in favor of the Defendants and against the Plaintiff.

Dated at Hutchinson, Kansas, this 30th day of November, 1954.

(S.) A. Lewis Oswald, for Oswald, Mitchell & Thiessen, Attorneys for the Plaintiff.

Acknowledgment of Service of the Above and Foregoing Notice of Appeal (Omitted in Printing)

[fol. 28] CERTIFICATE TO ABSTRACT (Omitted in Printing)

IN DISTRICT COURT OF RENO COUNTY

SPECIFICATIONS OF ERROR

The Court erred in denying to Plaintiff a permanent injunction against the City of Hutchinson, enjoining and restraining it from entering or trespassing on Plaintiff's real estate; and that Court further erred by holding G. S. 26-202 constitutional; that said 26-202 does not provide sufficient notice to the Plaintiff to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

[fol. 29] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

Appealed from the District Court of Reno County, Kansas

Honorable John Fontron, Judge

Counter-Abstract of Appellees

STATEMENT

Commencing on page 6 of Appellant's Abstract is shown the purported Answer filed by the Appellees in this case. [fol. 30] This was actually the Answer intended to be filed in answer to Appellant's original Petition. However, when Appellees' Motion to Strike was sustained, Appellant filed an Amended Petition, and the Answer shown in Appellant's Abstract was never filed and is not a part of the pleadings in this case. This discrepancy has since been pointed out to the attorneys for Appellant, who agree that said Answer shown in Appellant's Abstract was never filed in said case by Appellees, but that the following is the true and correct Answer filed therein:

IN DISTRICT COURT OF RENO COUNTY

ANSWER

Come now the defendants, and for answer to the amended petition of plaintiff filed herein, deny each and every, all and singular, the allegations of plaintiff's amended petition, except those hereinafter explained, admitted or modified.

Defendants admit the allegations contained in paragraphs numbered 2, 3 and 5 of plaintiff's petition, and defendants further admit that the right of eminent domain exercised by the defendant City of Hutchinson, Kansas, is based upon the provisions of G. S. 1949, 26-201 and 26-202, as well as upon other statutes; that Reno County District Court Case No. 7867 was for the purpose, among other things, of condemning a portion of plaintiff's property for a public street in the City of Hutchinson, Kansas; that said statute G. S. 1949, 26-202, provides for notice by one publication in the official city paper in condemnation proceedings such as the one here involved and that such a notice was published on April 14, 1954, in the Hutchinson News-Herald, the official city paper.

For further answer to plaintiff's petition, the defendants allege and state:

[fol. 31] 1. That said publication of notice in the Hutchinson News-Herald, the official city paper of the City of Hutchinson, Kansas, on April 14, 1954, was given by the commissioners duly appointed by the Judge of the District Court of Reno County, Kansas, in Case No. 7867, in the manner prescribed by G. S. 1949, 26-202, and contained all the information required by said statute; that said notice specifically named this plaintitff and described the portion of his property being condemned for a public street, and was published more than ten days prior to April 27, 1954, the date set forth in said notice for the meeting of the said commissioners appointed in said District Court Case No. 7867 for the assessment of damages and appraisal of the value of the land taken, all as provided by G. S. 1949, 26-202.

2. That the said notice by publication, as provided by G. S. 1949, 26-202, is sufficient notice under the due process

clauses of both the United States and Kansas Constitutions, and that G. S. 1949, 26-201 and 26-202, are valid and constitutional statutes and that the procedure followed by the defendant City of Hutchinson, Kansas, thereunder in condemning the aforesaid portion of plaintiff's property for a public street in said City is authorized by said statutes and is therefore valid and legal.

Wherefore, defendants demand judgment that plaintiff take naught by his suit and for the costs herein.

(S.) F. C. Littooy, City Attorney, Attorney for Defendants.

Duly sworn to by F. C. Littooy. Jurat omitted in printing.

[fol. 32] Certificate to Counter-Abstract (Omitted in Printing)

[fol. 33] In Supreme Court of Kansas

No. 39,782

Lee Walker, Appellant,

v.

City of Hutchinson, Reno County, Kansas, a Municipal Corporation; T. E. Chenoweth, City Manager of Said City; Robert G. King, Mayor and Member of the City Commission of Said City; Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City Commission of Said City, Appellees

Syllabus by the Court

Eminent Domain—Publication Notice—Constitutionality of Statute. In an action to enjoin a city from entering upon real estate taken by it under a proceeding in eminent domain, the record is examined, and it is held, that G. S. 1949, 26-202,

which provides that the commissioners appointed by the judge of the district court shall give any owner of the property sought to be taken ten days' notice by publication in the official city paper that at the time fixed by such notice the commissioners will appraise the value of the lands taken and assess the other damages done to the owners of such property, does not deprive such owner of due process of law and is not unconstitutional.

Appeal from Reno District Court; John Fontron, Judge.
Opinion Filed June 11, 1955. Affirmed

A. Lewis Oswald, of Hutchinson, argued the cause, and William L. Mitchell, and Patrick H. Thiessen, both of Hutchinson, were with him on the brief for the appellant.

Fred C. Littooy, City Attorney of Hutchinson, argued the cause, and Bill R. Cole, Assistant City Attorney of Hutchinson, was with him on the brief for appellees.

OPINION—June 11, 1955

The opinion of the court was delivered by

THIELE, J.:

This was an action in which the plaintitff Lee Walker sought an injunction against the defendant city to prevent an alleged trespass on his real estate. The relief sought was denied by the trial court and plaintiff has appealed.

Insofar as need be noticed plaintiff alleged that he owned certain described real estate in the city of Hutchinson and [fol. 34] that on April 12, 1954, the city, by its officials, commenced proceedings in the district court to condemn property for the acquisition of right-of-way for opening, widening and extending portions of named streets in the city; that plaintiff had never been notified in any manner that the city desired his real estate nor had he ever been served with summons nor given any personal notice that the city had filed the proceeding for the purpose of taking a part of his real estate; that the pretended right of the city to take the real estate owned by the plaintiff rested upon the authority of G. S. 1949, 26-201 and 26-202, which statutes are void and of no force because they attempt to vest the power in the

city to take property without due process of law; that the only notice to an owner of real estate, under those statutes, is by publication and is not sufficient under the due process clauses of the United States constitution and the state constitution; that plaintiff had no actual notice or any reason to know the city sought to condemn and take his real estate until the middle of August, 1954, unless it can be said the single legal publication, published once in a named newspaper gave him notice, and that such single published notice was not sufficient to satisfy the requirements of the due process clauses of the above constitutions. It was further alleged that the city was entering upon plaintiff's real estate for the purpose of building a highway across it, all in disregard of plaintiff's rights and that he was entitled to an order enjoining the city from so doing, and he prayed accordingly.

The gist of the defendant's answer was that the city was proceeding under the above statutes, and that it instituted proceedings in eminent domain and that the commissioners appointed by the judge of the district court gave notice by publication in the manner prescribed by G. S. 1949, 26-202 which notice specifically named the plaintiff, described the portion of his real estate being condemned for a public street and which notice was published more than ten days prior to April 27, 1954, the date set forth in the notice for the meeting of the commissioners for assessment of damages and appraisal of the lands taken; that the notice by publication and the procedure followed was authorized by the above statutes and was legal and valid. Attached to the answer was a copy of the notice published in the Hutchinson News-Herald, the official city paper, on April 14, 1954, which shows that notice of condemnation was given to Lee Walker and others that an application had been made re- [fol. 35] questing the district judge of Reno county to appoint commissioners to make an appraisement of lands taken under and by virtue of G. S. 1949, Ch. 26, Art. 2, and describing fourteen tracts of land in the city and that the judge had appointed three commissioners who would meet at a specified place on April 27, 1954, then and there to commence and proceed with the duties imposed upon them by law.

The plaintiff's reply admitted the material facts pleaded and denied the legal conclusion that the mentioned statutes did not violate constitutional provisions as to due process.

Details of the trial need not be noted. The trial court prepared a memorandum decision which covered rather fully the questions of constitutionality. The journal entry of judgment discloses the trial court heard the evidence, examined the pleadings and briefs filed and on November 1, 1954, found that G.S. 1949, 26-202 was constitutional; that the city of Hutchinson acted pursuant to it; that plaintiff had not been deprived of his property without due process of law and it denied plaintiff the relief for which he prayed and rendered judgment for the defendants.

The plaintiff perfected his appeal specifying as error that the trial court erred in holding G.S. 1949, 26-202 constitutional and in denying the injunction sought.

The question of constitutionality turns on the first sentence of the last mentioned statute, which reads:

"The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

For purposes of information we note the above statute was amended by the legislature in 1955 by the enactment of Senate Bill No. 313.

In his brief the appellant first directs attention to and quotes from 12 Am. Jur. 267, where it is stated that the elements of due process of law are notice, and an opportunity to be heard and to defend; that it is a rule as old as the law that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that a judgment without such citation and opportunity lacks all the attributes of a judicial determination [fol. 36] and is never to be upheld. Appellant then directs attention to the statute as quoted above and to the fact that

it provides two methods for giving notice, one by at least ten days' notice in writing, the other by one publication in the official city paper, and he contends that the first method is fair and the second method unfair. It is here pointed out that he does not contend that if the second method was proper, what was done by the city did not fully meet the statutory requirement. In expanding his argument appellant stresses his age, his education and the length of time he had owned his real estate; that the three branches of the government, executive, legislative and judicial, have a duty to uphold the constitution and that it may not be amiss to consider how such an unconstitutional act was ever made part of the statutes; that in fairness the city should have given him personal notice and should not have followed the provision for publication notice; that the statute provided a right way and a wrong way and the "wrong way" violated his constitutional rights to due process. There is no specific argument that a statute providing for notice by publication in a proceeding to condemn lands in the exercise of the right of eminent domain is unconstitutional as depriving the owner of due process of law, and except for the reference to 12 Am. Jur. 267, there is no citation of any authority in support of the argument made. In such a case we might follow the rule that where, in connection with a contention of error by the trial court, no citation is made of authorities in support, this court may well conclude that counsel, after diligent search, has not been able to find any, and affirm the judgment. (*McCoy* v. *Fleming*, 153 Kan. 780, 113 P. 2d 1074.)

In our opinion, however, the trial court did not err. In view of the question presented we need pay no attention to the provision for personal service, for none was had. The question is whether a statute which provides for publication service of notice, as was had, deprives the owner of real estate of his property without due process of law.

Our approach to the problem of constitutionality, or lack of it, is governed by the oft recognized rule that all presumptions are that the statute is constitutionally valid and before the court can declare it invalid it must clearly appear to be unconstitutional. (See *Hartman* v. *State Commission of Revenue and Taxation*, 164 Kan. 67, 70, 187 P. 2d 939;

Miller v. *Jackson*, 166 Kan. 141, 143, 199 P. 2d 513; *Board of Education of School District No. 1* v. *Robb*, 168 Kan. 368, [fol. 37] 369, 212 P. 2d 306, and cases cited therein.) We also bear in mind that the general rule is that proceedings to exercise the right of eminent domain are in rem and not in personam (29 C.J.S. 1129, 18 Am. Jur. 738, McQuillin on Municipal Corporations, Vol. 11, pg. 531, and *Todd* v. *Atchison, T. & S. F. Rly. Co.*, 134 Kan. 459, 7 P. 2d 79, and cases cited).

Although stated in varying language, in many of the texts and encyclopedias treating of notice in condemnation proceedings the rule almost universally followed is that where the statute does not preclude its application, notice by publication is sufficient and satisfies the constitutional requirement, even with respect to persons residing within the jurisdiction where the proceedings are pending. See Lewis on Eminent Domain, Third Edition, pg. 1010, § 568; Randolph on Eminent Domain, pg. 306, § 337; Nichols on Eminent Domain, Vol. I, pg. 339, McQuillin on Municipal Corporations, Vol. 11, pg. 549; 18 Am. Jur. pg. 967; and 29 C. J. S. pg. 1217.

In Merrill on Notice, Vol 1, pg. 510, § 518 (published in 1952) it is said:

"Assuming notification to be necessary, there is much liberality in the decisions as to the methods which, consistently with due process, may be employed. Save in isolated instances which hardly serve to mark exceptions to the general rule, personal notification is not regarded as an essential element of the 'law of the land,' unless a personal liability is to be enforced against one not otherwise subject to the 'jurisdiction'. The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the noticee, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.

"Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is

accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and the process of administrative tribunals. The place of printing the newspaper in which a notice affecting realty is published has been held immaterial, the important thing being publication within the locality wherein the land affected lies. Publication within the limits of the principal city in a water district has been adjudged due process as to owners of land outside the city limits but within the boundaries of the district.

[fol. 38] "Naturally combinations such as posting and publishing, or mailing and publishing, or a choice between either of two constitutionally permissible notifications, as posting or publishing, will pass muster."

In *Winnebago Furniture Mfg. Co. vs. The Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576, the court considered the sufficiency of a notice arising under a statute similar to ours and held, in part, that:

". . . The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as nonresident owners, in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. . . ." (l. c. 394)

Georgia v. Chattanooga, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796, involved condemnation of lands for railroad purposes. The facts need not be detailed. In the course of the opinion it was said the taking was a legislative and not

a judicial function and an opportunity to be heard in advance need not be given, and further, that personal service on the owner was not essential; that publication of notice was sufficient.

In *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953, the court considered an appeal from the judgment of the Supreme Court of Wyoming upholding a condemnation for road purposes. In disposing of the contention that the statute and proceedings under it amounted to a denial of due process of law, the court said:

"All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be in- [fol. 39] direct, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard v. Hunter*, 204 U. S. 241, at p. 262." (l. c. 283)

With respect to notice by publication, after stating the facts and the requirements of the statute, the court said further:

". . . These requirements in all material respects are identical with those passed upon by this Court in *Huling v.*

Kaw Valley Railway & Improvement Co., supra, in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law." (l. c. 285)

Appellees direct our attention to *Harrison v. Newman*, 71 Kan. 324, 80 Pac. 599. In that case the question was whether one statute requiring personal notice or another providing for notice by publication controlled. This court held the latter statute controlled and that notice thereunder was properly given. No question of constitutionality was involved and the case cannot be said to be decisive here.

No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that the trial court did not err in holding that G. S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant, and accordingly

The judgment of the trial court is affirmed.

[fol. 40] Petition for Rehearing covering 6 pages filed omitted from this print. It was denied, and nothing more by order.

[fols. 41-42] In Supreme Court of Kansas

Order Allowing Substitutions and Denying Motion for Rehearing—July 6, 1955

39,782

Lee Walker, Appellant,

v.

City of Hutchison, Kansas et al.

Motion by appellant to substitute as appellees herein certain newly and appointed officials of the City of Hutchinson for certain present appellees herein no longer officials of

said City, Allowed; Motion by appellant for rehearing, Denied.

[fol. 43] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

ORDER GRANTING MOTION TO SUBSTITUTE PARTIES-APPELLEE HEREIN—July 6, 1955

Now on this 6th day of July, 1955, this cause comes before the Court upon the Appellant's Motion to substitute certain newly elected and appointed officials of the City of Hutchinson, Kansas, for certain present appellees no longer officials of said City.

The Court, being fully advised in the premises, and after due consideration, Finds that said Motion should be sustained, and that certain parties be made parties-appellee herein in lieu of certain present parties-appellee.

It Is Therefore by This Court Ordered that John Olson, now the duly elected, qualified and acting Mayor of the City of Hutchinson, Reno County, Kansas, be and he is hereby made a party-appellee herein, in place of the present party-[fols. 44-45] appellee Robert G. King, no longer Mayor of the City of Hutchinson, Kansas.

It Is Further by This Court Ordered that Joe Bennett and E. J. Whalen, Jr., now duly elected, qualified and acting members of the City Commission of the City of Hutchinson, Reno County, Kansas, be and they are hereby made parties-appellee herein in place of Charles N. Brown and Jerry Stremel, no longer members of the City Commission of the City of Hutchinson, Kansas.

It Is Further by This Court Ordered that Hal Everett, now the duly appointed, qualified and acting City Manager of the City of Hutchinson, Reno County, Kansas, be and he is hereby made a party-appellee herein in place of T. E. Chenoweth, no longer the City Manager of Hutchinson, Kansas.

W. W. Harvey, Chief Justice for the Court.

[fol. 46] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Lee Walker, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Court below which ruled constitutional a state law re notice in condemnation proceedings, dated and entered in this action on June 11th, 1955; Order denying rehearing dated and entered July 6th, 1955.

This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

[fol. 47] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Abstract of Appellant.

b. Syllabus and opinion of the Supreme Court of the State of Kansas filed June 11th, 1955, and Order.

c. Order denying Motion for Rehearing, dated July 6th, 1955.

d. Order dated July 6th, 1955, substituting parties.

e. This Notice of Appeal, including proof of service.

III. The following questions are presented by this appeal:

a. Whether G. S. 26-202 of the Statutes of Kansas (1949), which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

b. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years

of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment.

A. Lewis Oswald, Attorney of Lee Walker, Appellant, Law Offices of Oswald, Mitchell & Thiessen, 119 West Sherman Street, Hutchinson, Kansas.

[fol. 48] Acknowledgment of Service of Notice of Appeal to the Supreme Court of the United States (Omitted in Printing)

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] Supreme Court of the United States

[Title omitted]

Order Noting Probable Jurisdiction—January 9, 1956

Appeal from the Supreme Court of the State of Kansas

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

January 9, 1956.